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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 341.

WILLIAM EARL DODGE AND JOSHUA T. DODGE,
PETITIONERS,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE PETITIONERS.

DANIEL T. HAGAN,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 341.

WILLIAM EARL DODGE ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA, LIBELLANT.

BRIEF FOR THE PETITIONERS.

Statement of Fact.

The facts in this case are undisputed. On April 18, 1924, members of the police force of the city of Providence, R. I., discovered Joshua T. Dodge and others aboard the motorboat "*Ray of Block Island*" at a dock in said Providence. The police officers then and there seized said boat and a quantity of intoxicating liquor which was on board.

On the same night said police officers removed the liquor from said vessel and took it to the police station, about a mile away in said Providence; Joshua T. Dodge was also taken into custody by the police officers and charged with illegal transportation of intoxicating liquor.

Several hours after the seizure the motorboat was delivered into the custody of Harry G. Sheldon, Federal Prohibition Director for the District of Rhode Island, said vessel having been guarded during the night by city police officers. At the time the vessel was turned over to the director of prohibition there was no liquor aboard and none of the defendants arrested were at the scene, the defendants and the liquor at that time being at the police station.

On December 10, 1924, said Joshua T. Dodge was convicted of illegally transporting intoxicating liquor in violation of Title II, Section 3, of the National Prohibition Act and paid a fine of $500.

On March 5, 1925, the United States Attorney for the District of Rhode Island filed a libel against the motorboat "*Ray of Block Island*," claiming its forfeiture to the United States under the provisions of Section 26, Title II, of the National Prohibition Act (R., 3-4). On April 6, 1925, a lien claim of mortgagee was filed (R., 7), which has not as yet been heard, and on April 7, 1925, William Earl Dodge and Joshua T. Dodge filed their claim for said vessel (R., 7), protesting that the taking over of said motorboat by the Federal prohibition agents from the police officers, by whom the boat was seized, was in violation of law, and

on the same day filed a motion to dismiss the libel on the grounds:

> "1. That the National Prohibition Act confines the duty of seizures of vehicles to officers of the United States and that a seizure by police officers under said act is without authority and is not recognized by a subsequent surrender of the vehicle to Federal officers.
>
> "2. That there is no authority under the State Prohibition Law to seize any boat or vehicle found transporting intoxicating liquor.
>
> "3. That forfeiture can only be declared if the thing sought to be forfeited was lawfully taken into possession."
>
> (R., 8.)

The answer of the claimants was filed on April 7, 1925 (R., 9), admitting all the averments of fact set forth in the libel, but denying that they constituted a cause of forfeiture.

Thereafter, to wit, on July 24, 1925, the case was called for hearing on the claimants' motion to dismiss and was fully heard and argued by counsel for the respective parties and was held for advisement, and on July 31, 1925, the opinion of the District Court granting claimants' motion to dismiss libel was announced (R., 10).

On August 1, 1925, decree of the District Court was entered dismissing the libel and ordering the United States marshal to deliver said motorboat "*Ray of Block Island*" to said claimants (R., 16). The time for issuance of the warrant of delivery was extended to August 20, 1925 (R., 16); on that date the United States

filed its petition for appeal (R., 17), and on the same date the Government's assignment of errors was filed (R., 18).

On March 3, 1926, the opinion (R., 23) of the Circuit Court of Appeals for the First Circuit reversing the decree of the District Court for Rhode Island was filed (R., 26). On March 29, 1926, on motion of the claimants, the Circuit Court of Appeals stayed its mandate (R., 27), and on April 16, 1926, said claimants filed a petition in this Court praying for a writ of certiorari, to be directed to the Circuit Court of Appeals, to bring up the record.

The United States did not oppose the granting of the writ in their memorandum brief, filed with this Court on the petition for writ of certiorari, and on May 10, 1926, this Court ordered that the petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit be granted in accordance with Rule 35, Section 5B, of this Court.

Specification of Errors.

The Circuit Court of Appeals for the First Circuit erred in reversing the decree of the District Court in remanding the case to that court for further proceedings not inconsistent with the opinion passed down by the Circuit Court (R., 26).

Question Presented.

The sole question at issue in this case is whether or not a vessel or vehicle used in illegally transporting

intoxicating liquor and seized by officers of the law who are not Federal officers may be forfeited to the United States under the provisions of Section 26, Title II, of the National Prohibition Act.

Statute Involved.

Section 26, Title II, of the National Prohibition Act (chapter 85, 41 Stat., 305, 315) provides in part:

> "When the commissioner, his assistant, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the

> liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, * * *."

ARGUMENT.

Point I.

Conflicting Law.

This question is brought before the Supreme Court because of three different and conflicting opinions from three circuits, the Fifth, Ninth, and First.

In November, 1923, the Circuit Court of Appeals for the Fifth Circuit decided the case of *U. S. vs. Story*, 294 F., 517. The District Court dismissed the libel, but this order was reversed by the Circuit Court, which held that the Eighteenth Amendment vested concurrent power of enforcement in the States, and that Section 1014 of the Revised Statutes of the United States,

> "providing for arrest of offenders against the laws of the United States by State magistrates, agreeably to the usual mode of process against offenders in such States,"

made it clear that Congress contemplated the enforcement of the amendment through State officers as well as through Federal officers. The court then said that because Section 26 contained the words, "any officer of the law," that a seizure by police officers constituted a good seizure, and that Congress did not provide for

enforcement under Section 26 by Government officers and Federal courts alone.

Section 1014 of the Revised Statutes reads:

> "For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense."
>
> *Rev. Stat., Sec.* 1014, *Barnes Fed. Code*, 1919, *Sec.* 1412.

This statute clearly intended a mode of procedure by justices empowered to bail after proper arrest in accordance with the law. It does not seem that this particular section of the Revised Statutes in any way authorized police officers to arrest on behalf of the United States except in such cases where Congress has particularly authorized the arrest by police officers of the State; and if the construction of the Story case is sound the appellant says that the seizure was not "agreeably to the usual mode of process against offenders in such State," because it is conceded that there is no State statute in Rhode Island authorizing seizure of vehicles transporting liquor.

Opinion District Court, Record, p. 13.

The Story case holds that the regularity of the seizure is not a necessary condition to a condemnation of the thing seized provided there is sufficient ground for an adjudication of a forfeiture. The case further holds that Section 26 of the act is cumulative and not exclusive.

On page 520 of the opinion the court says:

> "Destruction of the liquor and forfeiture of the vehicle are two rights of different nature and purpose, and the fact that they are both permitted to be pursued in the criminal cause, upon conviction of the person arrested, does not require that this be done."

The court further says, on page 519:

> "The remedy created in Section 26 applies by its terms only when a person is discovered in the act of transporting liquor in violation of the law, and is then and there arrested by the officer, and his vehicle and liquor seized, and he convicted, after being taken by the officer before a court of competent jurisdiction. If this is the only remedy available to the Government, in instances where the person in charge of the offending vehicle escapes before arrest or absconds or dies after arrest, no condemnation of the vehicle would be possible, and a large number of cases would go unprovided for."

In the case of *U. S. vs. Loomis*, 297 F., 359, 362, referring to Section 1014 of the Revised Statutes, the Ninth Circuit said that the section—

> "pertains to the mode or process relative to procedure by which an offender may be arrested, imprisoned, or bailed, but in our opinion does not affect a procedure in the Federal court which has to do with an inquiry into the legality of the seizure and forfeiture of his property."
>
> Citing *Roth vs. U. S.* (C. C. A.), 294 F., 475.

In the opinion of the District Court in the instant case the opinion sets forth (R., 15) that the court is unable to see where Revised Statute, Section 1014, affords support to a broad construction of the words "any officer of the law," contained in Section 26 of the National Prohibition Act, which includes police officers of the city.

In the Story case, *supra*, there was a seizure by police officers of an automobile which was not in the act of offending when the marshal took it over from the State officers. The facts were very similar to the case at bar. The vehicle was forfeitable under the State law.

In the Loomis case, *supra*, the court held that police officers are not authorized to seize vehicles used in transportation of intoxicating liquors, and that statutes authorizing seizure of personal property must be strictly construed. The vehicle was not forfeitable under the State law.

This Circuit Court held that Revised Statutes 1014 had no application to the seizure of property and expressly disapproved of the Story case, holding that the necessity of adherence to the rule of strict con-

struction constrained the court to hold that police authorities were not empowered to make the seizure. In the Loomis case police officers arrested Loomis while in the act of transporting liquor in an automobile in the city of Seattle, and several weeks after the seizure the vehicle was turned over to Federal prohibition authorities who asked for an order of forfeiture.

The court in the Loomis case held that forfeiture could only be declared if the thing sought to be forfeited was lawfully taken into possession. The court says:

> "Nor are we satisfied with the reasoning that, because the thing seized was afterward turned over by the police to the federal authorities, the illegal seizure was adopted, and by adoption related back and became a legal foundation upon which could rest an order of forfeiture and sale."

In the Story case the court relied upon the ruling laid down by this Court in "*The Caledonian*," 4 Wheat., 100; 4 L. Ed., 523, to the effect that—

> "any person may seize any property *forfeited to the use of the Government* either by the municipal law or by the law of prize for the purpose of enforcing the forfeiture," etc.

In the Loomis case the Ninth Circuit does not agree with the reasoning, and on page 362 says:

> "But the seizure there made was by a customs official, and under the general law of prize, and at a time when the general laws of war obtained. In Gelston *vs.* Hoyt, 3 Wheat., 246;

4 L. Ed., 381, Justice Story stated the common-law rule to be that any person might at his peril seize for forfeiture to the government, and that, if the government adopted the seizure and the property was condemned, he would be completely justified, and that it is not necessary to sustain the seizure or justify the condemnation that the party seizing shall be entitled to any part of the forfeiture. The court did not find it necessary, however, to rest its decision solely upon the principle just stated, inasmuch as there were express statutory provisions under which it was made the duty of the officers of the customs to make seizure of all vessels and goods liable to seizure by virtue of any act of the United States respecting the revenue.

"Section 1014 of the Revised Statutes (Comp. St. Section 1674), which is made applicable in the enforcement of the National Prohibition Act, pertains to the mode or process relative to procedure by which an offender may be arrested, imprisoned, or bailed, but in our opinion does not affect a procedure in the federal court which has to do with an inquiry into the legality of the seizure and forfeiture of his property."

The District Court in its opinion (R., 13) says:

> "It is conceded that the state law of Rhode Island conferred no authority to seize any boat or vehicle found transporting intoxicating liquor."

The opinion then discussed the case of *Carroll et al. vs. U. S.*, 267 U. S., 132, and especially at page 155, as follows:

"Under Section 28, Title II, of the Prohibition Act the Commissioner of Internal Revenue, his assistants, agents and inspectors are to have the power and protection in the enforcement of the Act conferred by the existing laws relating to the manufacture or sale of intoxicating liquors. Officers who seize under Section 26 of the Prohibition Act are therefore protected by Section 970 of the Revised Statutes, providing that:

" 'When, in any prosecution commenced on account of the seizure of any vessel, goods, wares, or merchandise, made by any collector or other officer, under any Act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution: *Provided*, That the vessel, goods, wares, or merchandise be, after judgment, forthwith returned to such claimant or his agent.'

"It follows from this that if an officer seizes an automobile or the liquor in it without a warrant and the facts as subsequently developed do not justify a judgment of condemnation and forfeiture, the officer may escape costs or a suit for damages by showing that he had reasonable or probable cause for the seizure. *Stacey vs. Emery*, 97 U. S. 642.

"It is perhaps significant that the protection afforded by Sec. 28 of the Prohibition Act is

> confined to the 'commissioner, his assistants, agents and inspectors, and all other officers of the United States, whose duty is to enforce criminal laws.' "

The Circuit Court of Appeals agrees with the decision of the District Court as to the construction of Section 26 of Title II of the National Prihibition Act that said section confers authority only upon U. S. officers (R., 24-25), but the Circuit Court is of the opinion that the District Court erred in dismissing the libel, as the United States, in taking over the vessel and filing the libel to enforce the forfeiture, ratified and adopted the acts of the police officers and thereby rendered the seizure lawful under Section 26 (R., 25).

The Circuit Court then, basing as its authority, cites the case of "*The Caledonian*," 4 Wheat., 99, 101, saying:

> "It is a general rule that any person may seize any property *forfeited to the Government*," etc.

The Circuit Court then cites:

Wood vs. U. S., 16 Peters, 341.
Taylor vs. U. S., 3 How., 197.
U. S. vs. Story, 294 F., 547.
U. S. vs. One Studebaker Seven Passenger Sedan, 4 F. (2d), 534.
The "G 883," 6 F. (2d), 416.

In the case of "*The Caledonian*" it will be noted that the decision rested upon the principle of law that

any person may seize any property forfeited. The appellant in the present case contends that his property was not forfeited in the sense with the term as used in "*The Caledonian*" at the time of seizure, and could not be forfeited under Section 26 of the act until after a conviction of the defendant.

The theory laid down in "*The Caledonian*," *i. e.*, adoption, has no application to the case at bar because:

1. The property was not forfeited *ipso facto* to the use of the Government.
2. The property was not forfeited under the law of prize.
3. In the case of "*The Caledonian*" there was a lawful seizure to be adopted, whereas in the case at bar there was not a suitable seizure for the principle of adoption.

It is admitted that the State police could not under the State law or any law other than the Volstead Act seize any vehicle transporting liquor.

In the case of "*The Caledonian*" the vessel sailed as an American ship from Charleston, S. C., with a cargo bound for Lisbon under a British license. During the voyage the ship was captured by a British vessel and sent to Bermuda for adjudication. Upon trial she was acquitted and her cargo, being prohibited from exportation, was sold by the agent of the claimant at Bermuda and the proceeds remitted for his use.

In November, 1913, the vessel sailed from Bermuda and upon her arrival at Newport, in the District of Rhode Island, from which this case arises, she was seized by the collector of the port as forfeited to the

United States. The libel alleged for causes of forfeiture:

> 1. The ship having on board a British license.
> 2. Engaged in trade with the enemy.
> 3 4. For using a British license contrary to the Act of Congress prohibiting the use of British licenses.

On page 102 of the opinion it is said:

> "By the general law of war, every American ship sailing under the pass or license of the enemy, or trading with the enemy, is deemed to be an enemy's ship, and forfeited as prize. * * * The right of the government to the forfeiture is not founded on the capture; it arises from its general authority to seize all enemies' property coming into our ports during war; * * * it is a general rule that any person may seize any property forfeited to the use of the government, either by the municipal law or by the law of prize, for the purpose of enforcing the forfeiture."

It will be noted from the above decision that the court's opinion was based solely upon the law of prize and during a period of war. The court declared the goods and ship forfeited *ipso facto*. The seizure was valid for under the law of prize (or war) anyone is authorized to seize property already forfeited on behalf of the Government. It necessarily follows that in such a case subsequent ratification or adoption, so called, of the original lawful seizure was valid and a forfeiture was perfected.

Quite in contrast to the principle laid down in "*The Caledonian*" is that of the "*Ray of Block Island.*" In this case neither the goods or the vessel were forfeited *ipso facto*. As will be later shown in the brief any property which may have a lawful use is not forfeited *ipso facto*, and under Section 26, Title II, of the National Prohibition Act, even though the vessel may have been used for an unlawful purpose, the vessel would not be forfeited except upon a culmination of certain criminal provisions of the act.

On June 30, 1864, Congress passed an act (*R. S., Sec.* 4613; *Act June* 30, 1864, *c.* 174, *Sec.* 33, 13 *Stat.* 315; *Barnes Federal Code*, 1919, *Sec.* 7635) known as the law of prize which provided:

> "The provisions of this Title shall apply to all captures made as prize by authority of the United States, or adopted and ratified by the President of the United States."

On the same date and in Section 29 of the same statute there was a provision relative to recaptures.

An examination of these statutes used as the basis of prize clearly shows that the case of "*The Caledonian*" was founded upon acts of Congress which were devised to safeguard the nation in so far as neutrality was concerned. These acts were passed in view of international standards and drastic legislation was set forth therein. This Court had no difficulty in determining the intent of Congress from the wording of those acts.

Throughout the reports there is nowhere found an-

thority for the theory of adoption unless it can be based upon R. S. 4613, which says that the provisions shall apply to captures made as prize or adopted and ratified by the President of the United States.

The theory of adoption will be discussed later in the brief, but the appellant contends that there is nothing in the case of "*The Caledonian*," nor in the cases cited by the Circuit Court in the "*Bay of Block Island*," which warrant the application of the theory of adoption on the part of the Government.

In the case of *Gelston et al. vs. Hoyt*, 3 Wheat., 246, there was a civil suit brought in New York for an alleged trespass for taking and carrying away and converting to their own use the ship "*American Eagle*." The defense was that the ship was attempted to be fitted out and armed for employment in the service of a foreign state to commit hostilities upon the subjects of another foreign state with which the United States was at peace, and that the ship was seized in pursuance of instructions and directions of the President of the United States as *forfeited* to the use of the United States according to the statute aforesaid.

The second plea set forth that the ship was seized "under instructions of the President of the United States in order to the execution of the prohibition and penalties of the act in such cases made and provided."

The act referred to is the Act of June, 1794, providing that if any person should fit out and arm or attempt to fit out and arm or in any way be concerned in fitting out and arming a ship with intent to have the same

employed in the service of any foreign state with whom the United States is at peace, every such vessel should be forfeited, one half to the person giving the information and the other half to the United States.

The seizure was made by the Collector of Customs of New York in accordance with the Act of the 18th of February, 1793, chapter 8, Section 27 (Stat. at Large, vol. I, p. 305), providing that officers of the revenue were authorized to make seizures of any ship or goods for a breach of the neutrality laws of the United States.

The statute of June 5, 1794, chapter 50, Section 3 (Stat. at Large, vol. I, p. 381), prohibited the fitting out of any vessel to cruise against the subjects of any foreign state at peace with the United States. The suit sounded in tort and resulted in a judgment of $106,000 for the plaintiff claiming an illegal seizure, and the verdict was upheld by the United States Supreme Court. The United States District Court held that there was no reasonable cause for seizure and refused to issue a certificate of probable cause.

The entire case, as in the case of "*The Caledonian*," was based upon a statute passed by Congress pertaining to the neutrality laws of the nation. The statute authorized seizure because of the fact that once a vessel was armed in violation of the statute it became forfeited *ipso facto* to the United States.

The much-quoted statement of Judge Story in his opinion, found on page 310, to the effect that at common law "any person may, at his peril, seize for a forfeiture to the Government; and if the Government adopt his seizure he will be justified," is pure *dicta*

in so far as the opinion of the court is concerned. A careful reading of the case shows that this statement was made by the justice who wrote the opinion and who had in mind the neutrality law and the wording thereof as heretofore quoted.

The case of *Taylor et al. vs. U. S.*, 3 How., 197, was based upon the revenue laws and the Duty Collection Act of March 2, 1799, chapter 128. Section 68 of the act authorized certain officers of the United States, or other persons specially appointed by either of them for that purpose, to capture vessels, search for and seize goods taken in violation of the customs laws. The decision was based upon the internal-revenue laws which, we will point out, are entirely different and which have received much more liberal construction than penal statutes such as the Volstead Act, and especially Section 26 thereof.

In construing the Act of March 2, 1799, in the case of "*The Missouri*," 17 Fed. Cases, 479, Case No. 9652, the court said, in citing *Taylor vs. U. S.*, 3 How., 210:

> "In construing such a statute, milder as it is than many statutes, it should be borne in mind, that it is a revenue law, and like all revenue laws, to be so construed as effectually to accomplish the intention of the legislature, and not, necessarily, with great strictness in favor of the defendant."

The Duty Collection Act, March 2, 1799, is:

> "An act to regulate the collection of duties on imports and tonnage."
>
> *Vol. I, U. S. Statutes at Large, p.* 627.

In the case of *Wood vs. U. S.*, 16 Peters, 342, decided by this Court in 1842, the court says that a seizure can be sustained if, in point of fact, the seizure could be maintained as founded upon an actual forfeiture *at the time* of the seizure.

Once more the appellant would call to the attention of the Court that there is distinction between forfeiture at the time of the seizure as set forth in the Wood case, and forfeiture dependent upon subsequent events in pursuance of Section 26 of the Volstead Act.

Ever since the decision in the Boyd case the generally accepted view has been that the Government can claim no advantage as a result of an illegal search and seizure, and that the person whose rights have been violated must be placed in *statu quo*.

Boyd vs. U. S., 116 U. S., 616.

Point II.

Construction of Statutes.

The Story case holds that Section 26 of the Volstead Act is broad enough to confer authority upon State as well as Federal officers. It also holds that there is no need to show that the vehicle proceeded against be still violating the law, after seizure by State officers, and when surrendered by them to the United States Government. This case also holds that the regularity of the seizure is not a necessary condition to condemnation, providing there is sufficient ground for forfeiture.

The same section is again construed in a District

Court decision in the State of Washington, in which it is said:

> "The forfeiture demanded is a proceeding in rem under the procedure provided by the National Prohibition Act, and such procedure must be complied with in order to divest the owner of his title. The procedure provided is not merely directory and cumulative, but is jurisdictional. This statute gives a new power, a power to divest title from the owner of property, and the statute provides means of enforcing such power, which is controlling. * * * Under the Act of March 2, 1799, 1 Stat. 678, the right to libel was absolute, and not dependent upon statutory conditions and restrictions; and the return of a car used in violation of Act, June 22, 1874, Sec. 17 (Comp. St. Sec. 10132), could not be decreed prior to a declaration of forfeiture. The Act of June 15, 1917 (Comp. St. Ann. Supp. 1919, Sec. 7678f), gives the owner the right to petition a restoration any time before condemnation proceedings have been instituted. Under the acts, *supra*, the disposition of the property is decreed upon trial after seizure on process duly issued.
>
> "By the provisions of Section 26, *supra*, the vehicle after seizure may be instantly returned to the owner, upon execution by him of a bond to produce the property at the criminal trial, and disposition must be decreed upon the trial of the criminal case. Forfeiture by original seizure depends upon the statute. Congress may declare the forfeiture absolute upon the seizure, or make the forfeiture depend upon conditions. *U. S. vs. Stowell*, 133 U. S., 11; 10 Sup. Ct., 244; 33 L. Ed., 555. The Congress may provide for the seizure of the vehicle at any time, for having

offended, but before any forfeiture can be decreed, the jurisdictional facts as outlined by the statute must be in harmony with the taking or detention. *U. S. vs. Two Hundred and Sixty-seven Gold Pieces and One McLaughlin Automobile* (D. C.) 255 Fed., 217."

U. S. vs. Hydes, 267 Fed., 470 (D. C.).

A search that is unlawful when it begins is not made lawful when it ends by the discovery and seizure of liquor.

U. S. vs. Slusser (*D. C.*), 270 Fed., 818.

The Story case, as already set forth, construes Section 26 to mean that seizure by officers other than those of the United States may be adopted by the Government. In the opinion of the Circuit Court in the case at bar, although the court agrees with the Loomis case to the effect that there is no statutory power enabling officers other than Federal officers to make seizures under Section 26, it decides that if a seizure is made by any person it may be adopted by the Government.

By executive order, dated May 18, 1926, published May 21, 1926, and numbered 4439, President Coolidge amended an executive order of January 17, 1873, which was issued by President Grant. That order declared that no person holding a Federal position, with certain exceptions, should hold office under any State or local Government. The order of President Coolidge removed the inhibition against the employment of State officers as Federal agents which existed by virtue of the policy adopted by President Grant.

There were many precedents for this policy.

President Roosevelt's executive order of June 26, 1907.

President Taft's executive order of August 4, 1909.

President Wilson's executive orders of July 9, 1914, *October* 6, 1915, *April* 14, 1917.

The right of the President in the premises was challenged and the matter received the attention of the Senate Judiciary Committee which, by a majority report, stated that no constitutional principle, in its opinion, was violated by the order.

It is apparent, however, that prior to May 8, 1926, State officers were prohibited to act for and in behalf of the United States as Federal officers. In the city of Providence, State of Rhode Island, the police department passed rules and regulations, a copy of which was as follows:

> "The police shall devote their whole time and attention to the business of the department, and they are expressly prohibited from following any other calling, or being employed in other business. Although certain hours are allotted to the respective members for the performance of duty on ordinary occasions, yet at all times, when notified, they must be prepared to act immediately, and the same responsibility as to the detection and prevention of crime and the promotion of order rests upon them when not in uniform, or off duty, as when on duty in uniform."

It is apparent, therefore, that at the time of the seizure of the "*Ray of Block Island*" President Grant's order was in effect as well as the rules of the police department of the city of Providence prohibiting police officers from acting as Federal agents.

It is further apparent that if the police officers in seizing the motorboat "*Ray of Block Island*" seized in behalf of the United States it was as citizens and not as "*any officer of the law*," because of the fact that they were prohibited from acting on behalf of the United States by President Grant's order as Federal officers, and were prohibited from holding office in behalf of the Government by orders of the police department of the city of Providence.

The legislature of Rhode Island has passed no law authorizing any officer of the State of Rhode Island to seize any vehicle transporting liquor either in behalf of the United States or in behalf of the State of Rhode Island. In fact the Eighteenth Amendment has yet to be ratified by the legislature of the State of Rhode Island, although the State has a prohibition law.

A penal statute cannot be extended by implication or construction. It cannot be made to embrace cases not within the letter, though within the reason and policy, of the law. "It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms."

Todd vs. U. S., 158 U. S., 278; 15 S. C. R., 889; 29 L. Ed., 982.

Although a case may be within the mischief intended to be remedied by a penal act, that fact affords no sufficient reason for construing it so as to extend it to cases not within the correct and ordinary meaning of its language.

U. S. vs. Sheldon, 2 Wheat., 119; 4 L. Ed., 199.

Penal statutes can never be extended by mere implication to either persons or things not expressly brought within their terms.

Lewis' Sutherland Stat. Const., 2d Ed., vol. II, p. 965, and cases cited.

Constructive crimes—crimes built up by courts with the aid of inference, implication, and strained interpretation—are repugnant to the spirit and letter of English and American criminal law. All doubts as to construction are resolved in favor of the defendant. It is a principle in the construction of statutes that the legislature does not intend to grant exceptional powers, privileges or exemptions by doubtful language, but will in such cases express itself clearly, and intends no more than it so expresses.

Lewis' Southerland Stat. Const., supra, p. 966, citing U. S. vs. Paul, 6 Peters, 141; 8 L. Ed., 348.

Effect is to be given to the plain meaning of the language, and strict construction is to be applied only where the effect is reasonably open to question.

Bolles vs. Outing Co., 175 U. S., 262; 20 S. C. R., 94; 44 L. Ed., 156.

When either of two constructions can be given to a statute and one of them involves a forfeiture, the other is to be preferred.

Lewis' Southerland Stat. Const., supra, citing Vattel's 20th Rule of Construction.

Farmers', etc., Nat. Bank vs. Dearing, 91 U. S., 29, 35; 23 L. Ed., 196.

Nor can a statute be extended beyond its grammatical sense or natural meaning on any plea of the failure of justice. If the statute is ambiguous, the construction adopted should be that most favorable to the accused. Courts are authorized to inquire into and carry out the manifest intention of the legislature; but if there is such an ambiguity in a penal statute as to leave reasonable doubts of its meaning, it is the duty of a court not to inflict the penalty.

Lewis' So. Stat. Const., supra, p. 970.

In connection with the above citations it will be noted that in the opinion of the Circuit Court in the case at bar the court expressly held that Federal officers *only* were included under the National Prohibition Act, and that only Federal officers were empowered to seize under the act, yet adhered to the doctrine of adoption.

This Court has also held that statutes to prevent frauds upon the revenue, although they imposed penalties or forfeitures, are not to be construed like penal laws generally strictly in favor of the defendant, but are to be fairly and reasonably construed so as to carry out the intention of the legislautre.

U. S. vs. Stowell, 133 U. S., 1.

Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress public wrong and promote public good. They should be so construed as to carry out the intention of the legislature in passing them and most effectually accomplish these objects.

Cliquot's Champagne, 3 Wall., 114, 145.
Skinner vs. Thomas, 171 N. C., 98.
U. S. vs. One Cadillac, 255 Fed., 173.

In Skinner *vs.* Thomas, *supra*, the facts involve the protection of the mortgagee's interest in vehicles seized while transporting intoxicating liquor. Regarding forfeiture, the court, in citing *Smithwick vs. Williams*, 30 N. C., 268, says:

> "Penal statutes cannot be extended by equitable construction beyond the plain import of their language."

And in another case it was held:

> "It is a well settled rule that penal statutes must be strictly construed. They will receive no equitable construction beyond their plain language."
>
> *McLaughan vs. Mitchell*, 126 N. C., 683.

Under the settled principles of the common law, and the constitutional provisions for the security of person and property, and immunity from unreasonable searches and seizures, a seizure cannot be made except

under authority of a statute conferring power so to do.

Re Swan, 150 U. S., 637; 37 L. Ed., 1207; 14 S. C. R., 225.

The provisions of the internal-revenue laws do not apply to cases arising under the National Prohibition Act and libels filed under this act must stand or fall under the authority of the National Prohibition Act alone.

U. S. vs. Amer. Brewing Co., 296 F., 772.

The Ninth Circuit Court, which decided the Loomis case, 297 F., 359, in a later decision reaffirms the Loomis case and draws a large distinction between forfeiture cases under Section 26 of Title II of the National Prohibition Act and forfeiture under Section 3450 of the Revised Statutes, for defrauding the Government of an internal-revenue tax.

The court, in this later case, holds that it decided in the Loomis case that police officers were not officers within the meaning of Section 26. The court then says that the discussion in the opinion extended to forfeitures generally, but that part of the discussion was mere *dicta;* that the court is convinced that seizure by a revenue officer is not a necessary perquisite of a forfeiture under Section 3450 of the Revised Statutes.

This circuit then draws the distinction, already set forth in this brief, to the effect that the cases of *Gelston et al. vs. Hoyt, supra, Wood vs. U. S., supra,* and *Taylor et al. vs. U. S., supra,* were cases involving either the law of prize or the revenue statutes.

By implication, the Ninth Circuit therein holds that seizures under the internal-revenue or prize law may be sustained where the seizure is made by any person, and that the theory of adoption may follow, but that under Section 26 of Title II of the National Prohibition Act the seizure must be made by Federal officers of the United States and none other.

U. S. vs. One Studebaker 7 Passenger Sedan, 4 F. (2d), 534 (C. C. A.).

U. S. vs. One Cadillac, 255 Fed., 173.

> "A right to seize under a federal act must be found in the federal statutes. As a general rule of construction, statutes which confer upon officers powers of seizure and arrest refer only to officers of the jurisdiction which enacts the statute. * * * The seizures by the police appear to have been unwarranted in law."
>
> *U. S. vs. One Reo Motor Truck*, 6 F. (2d), 412 (D. C.).

Point III.

Prize Law.

The law of prize (R. S., Sec. 4613, Act of June 30, 1864, c. 174, Sec. 33, 13 Stat., 315) has already been quoted in this brief under point one. As has already been pointed out, this is a statute which provides for adoption of seizures and ratification by the President of the United States.

It has been held that captures in war enure to the Government and can only become private property by

its grant. The right of the citizen to demand condemnation of vessels or property as prize for his benefit must be derived from acts of Congress.

An examination of the statutes pertaining to prize discloses that the Government intended to declare no property rights existing in any vessel used in violation of the neutrality laws, and that if captured the prize master and his crew were to divide the spoils (R. S., 4613).

However, by Act of Congress, March 3, 1899, chap. 413, Sec. 13, 30 Stat. 1007, the law distributing proceeds of prize among captors was repealed.

See "The Manila Prize Cases," 188 U. S., 254.

It is sufficiently obvious that the general object of the enactment of the prize law was to promote the suppression of rebellion by subjecting property employed in aid of it with the owner's consent, to confiscation. It extended to all descriptions of property, real or personal, on land or water. All alike were made subjects of prize and capture, and, under the direction of the President, of seizure, confiscation, and condemnation.

The law of prize is a law of war, which is to be exercised at the order of the Executive, and not upon the principles of policy or equity; and while prize courts, where questions of doubt arise, yield as far as possible to the claims of humanity and respect for personal rights, yet they cannot be controlled by such considerations. By the prize law, as accepted at the present time, war vessels of a belligerent had the right, in the absence of any declaration of exemption by the political

power, to capture wherever and whenever found afloat anything which belongs to or is the property of the enemy.

"*The Buena Ventura,*" 87 Fed., 927, 929.

In the case of "*The Caledonian,*" 4 Wheat., 99, 101, it would seem that the general rule therein laid down is not one to be applied to all seizures, but to only those seizures of property which is already forfeited to the use of the Government.

Property is captured when it is taken or seized when in hostile possession by the military or naval forces, and is property which has been actually seized by such forces.

Lamar, executor, vs. Browne et al., 92 U. S., 187-194.

U. S. vs. Padelford, 76 U. S. (9 Wall.), 531-540.

In the case of *Lamar, executor, vs. Browne et al.*, 92 U. S., 187, there was an action of trover to recover for alleged conversion of certain cotton by the defendants. The defendants justified as agents of the United States to receive and collect abandoned and captured property, under several acts of Congress. The cotton had been seized by the Government during the Civil War. The court said:

> "Property captured at sea can never be converted by the captor until it has been brought to legal adjudication; and it is his duty to bring his prize into some convenient port for that purpose. Not so in general with regard to movable

> property on land. There the capture changes the ownership without adjudication unless restrained by governmental regulations."

This point is raised chiefly for the purpose of emphasizing the fact that cases relied upon as authority in the Story decision are cases founded upon seizures arising out of violations of the revenue laws or the law of prize.

Point IV.

Transportation.

It has been held that a vehicle which has reached the end of its journey, but is not unloaded, that is, its load still remains to be delivered, may still be considered as being used for the transportation of its contraband cargo. The common reasoning would be that after transportation is ended the vehicle cannot be seized because it had been used in the unlawful transportation of intoxicating liquors, and this especially in view of Section 26, which says:

> "When the commissioner, his assistant, inspectors, or any officer of the law, shall discover any person in the act of transporting in violation of law," etc.
>
> *Sec. 26, Title II, N. P. A. (Chap. 85) 41 Stat., 305, 315.*
>
> *State vs. Charosky*, 122 Me., 285.

It has been held in the Federal courts that the arrest of a defendant for a previous illegal transportation of liquor under Section 26, N. P. A., does not authorize

the seizure without warrant and forfeiture of an automobile used in such prior transportation.

U. S. vs. Hydes, 267 F., 470 (D. C.).

And, again, it has been held that forfeiture of vehicles must be in strict pursuance to the terms of the statute in the following essentials: (1) That an officer of the law discover some person in the act of illegally transporting liquor in the vehicle; (2) the seizure of the liquor so transported or possessed; (3) the seizure of the vehicle and arrest of the person; (4) that the *officer* proceed against the person and retain the vehicle, unless redelivered to the owner on giving bond; (5) conviction of the person and order of sale of the vehicle; (6) distribution of the proceeds.

U. S. vs. Slusser, 270 Fed., 818 (D. C.).

It will be noted from the law as laid down in the above case that there must be a sale of the vehicle seized and distribution of the proceeds, both of which are absolutely opposed to the law of prize on which the cases of "*The Caledonian*," *Gelston et al. vs. Hoyt*, and *U. S. vs. Story* were based.

Point V.

Officers.

In the case of *U. S. vs. Loomis*, 297 Fed., 359, the court, on page 361, says:

> "We are cited to section 15 (35 Stat. 622, Comp. St. Sec. 2953), conferring power upon 'any civil officer having authority under the

laws of the United States or of any state, territory, or district to arrest offenders, to summarily arrest a deserter from the Navy or Marine Corps * * * and deliver him into the custody of the naval authorities'; but it is to be noted that the express language of that statute makes it lawful for any such civil officer to arrest. There is an express authority also under Rev. St. Sec. 3071 (Act July 18, 1866, 14 Stat. 180, Comp. St. Sec. 5774), for marshals, their deputies, sheriffs or their deputies, constables and police officers to apprehend, arrest, and receive the surrender of deserters. So, in the Act of July 5, 1884 (23 Stat. 118, Comp. St. Sec. 4299), pertaining to the admission of Chinese laborers, "* * * all peace officers of the several states and territories * * * are hereby invested with the same authority as a marshal or United States marshal in reference to carrying out the provisions of this act," etc.; and in the later Act of September 13, 1888 (25 Stat. 479 Comp. St. Sec. 4313), 'all peace officers of the several states and territories * * * are hereby invested with the same authority in reference to carrying out the provisions of this act, as a marshal or deputy marshal of the United States,' etc. Cases which decide upon the admissibility of evidence are not persuasive, for the regularity of a seizure is not always a necessary condition to the use of the thing seized as evidence upon a criminal trial, where conviction of an offense is sought. The courts will not try the collateral question of how the evidence was obtained. Robinson *vs.* U. S. (C. C. A.), 292 Fed. 683."

And the above circuit subsequently sustained this ruling to the effect that police officers had no right to seize under Section 26, Title II, of the National Prohibition Act.

U. S. vs. Thomas, 297 Fed., 362.

Police officers are not such officers of the law as may seize under Section 26.

U. S. vs. One Reo Motor Truck, 6 Fed. (2d), 412.

And in the Fourth Circuit the court has said:

> "Doubtless it (Eighteenth Amendment) does confer upon the several states power to enact legislation appropriate to the purpose of enforcement of the amendment. * * * But it does not make prohibition officers of the several states, by reason of their state commissions, officers of the United States exercising federal authority."
>
> *Kanellos vs. U. S.*, 282 Fed., 461.

The Circuit Court of Appeals in the case at bar cites as authority for its decision "*The Caledonian*," 4 Wheat., 99, 101, and, among others, the "*G-883*," 6 Fed. (2d), 416. The latter citation, we respectfully submit, is not in point because the vessel was arrested by officers of the United States as she was coming in from sea. The vessel was not taken by police officers and the vessel at the time was not arrested under Section 26 of the Volstead Act, but for violating the internal-revenue laws. The case is not in point.

The same may be said of the citation *U. S. vs. One Studebaker 7 Passenger Sedan*, 4 Fed. (2d), 534, de-

cided in the Ninth Circuit, because that was a seizure under the internal-revenue laws and not under Section 26, Title II, of the National Prohibition Act.

The United States has no power to take liquors away from a State officer who seizes them under a State statute.

> *U. S. vs.* 26 *Cases of Intoxicating Liquor*, 287 Fed., 540 (D. C.).

The law cannot blow hot and cold together. If police officers are authorized to seize under Section 26 on the theory that they are officers of the law, then their actions should be controlled by the Fourth and Fifth amendments of the Constitution of the United States. It would be inconsistent to hold that they are Federal officers acting in pursuance of a Federal statute at the time of the seizure of a vehicle for the purpose of forfeiture, and that they are not Federal officers when, on trial, the Fourth and Fifth amendments are invoked as a protection to the defendant against unlawful acts of State officers.

It has been held in the District Court for the Western District of Missouri that the Fourth Amendment to the Constitution of the United States is not directed to individual conduct of State officials. Police officers of that State may make arrests for violation of the prohibitory law by virtue of the authority vested in them in the *enforcement act of that State*, which is concurrent with the Federal enactment known as the Volstead Act. The court says:

> "In so doing they act as state officers, and, though their procedure may not accord with that required and guaranteed by the fundamental law in the federal jurisdiction, nevertheless the evidence they procure, if otherwise competent and material, may be used in prosecutions in a federal jurisdiction, if it comes to the knowledge of the federal prosecuting officer. But, as has been said by the Supreme Court, and in the lesser federal courts, the alleged unlawful search and seizure must not be made by, or under the direction of, any officer of the United States."

This Court seems to clearly draw a distinction between State and Federal officers, and that when an officer of the State acts he is not acting in pursuance of any Federal statute. The court holds that if there is a tacit understanding between State and Federal officers regarding the enforcement of the Federal Prohibition Law that the presence of State officers cannot affect the defense afforded by the Fourth and Fifth amendments to the Constitution.

U. S. vs. Falloco, 277 Fed., 75.

Marron vs. U. S., 8 Fed. (2d), 251, 259 (18-19) (C. C. A.).

The Circuit Court for the First Circuit has already decided that police officers are not officers of the United States.

> "Under the Act of March 3, 1917, Sec. 10 (29 Stat. 1127, Comp. St. Ann. Supp. 1919, Sec. 3421¼ff), it is provided that, in the District of Columbia, prohibition search warrants 'shall be

placed in the hands of the captain, or acting captain, of the police precinct in which the room, house, building, or other place referred to is located.' Police captains are officers of the District of Columbia and not of the United States. 17 Op. Attys. Gen. 489; 18 Op. Attys. Gen. 16)."

Keene vs. U. S., 300 Fed., 493, 501.

It has been held that under 13 U. S. Stat. at Large, 29, authorizing the condemnation of any boat introducing intoxicating liquor into the Indian country on a seizure made by the "Superintendent of Indian Affairs, an Indian agent or sub-agent, or the commanding officer of a military post," there is no jurisdiction unless the libel shows a seizure by one of those officers; and an amended libel is fatally defective which shows only a seizure by the marshal under a writ based on the original libel.

U. S. vs. "The Cora," 46 N. W., 503 (Dak. Sup. Ct.).

POINT VI.

Search and Seizure.

Search and seizure under the National Prohibition Act, and especially Section 26 of Title II, where forfeiture is demanded, is a proceeding *in rem*, and such procedure must be complied with in order to divest the owner of his title. This statute gives a new power, a power to divest title from the owner of property, and the statute provides the means for enforcing such power, which is controlling.

U. S. vs. Hydes, 267 Fed., 470.

It is apparent under the foregoing decision that title is not divested *ipso facto* as under the revenue laws, the basis for "*The Caledonian*" and similar decisions. Seizure of the vehicle can only be made when liquor is seized. The law does not forfeit all vehicles at some time used for illegal transportation of liquor, but only those taken in the act. One may be convicted of illegal transportation, yet the vehicle will not be forfeited, unless seized at the time.

U. S. vs. Slusser, 270 Fed., 818.

There is a vast difference between seizures under Section 26, Title II, of the National Prohibition Act and those under Section 3450 of the Revised Statutes for violation of the internal-revenue laws.

U. S. vs. One Studebaker 7 Passenger Sedan, 4 F. (2d), 534.

Seizures by the police are unwarranted in law.

U. S. vs. One Reo Motor Truck, 6 F. (2d), 413.

Property cannot be seized under a common-law libel *in rem*, since the National Prohibition Act is in derogation of the common-law rights of citizens. Specific procedure provided for its enforcement must therefore be regarded as exclusive.

U. S. vs. Franziono, 286 Fed., 769 (C. C. A. Dis. Col.).

Rev. Stat., Section 1014 (Comp. Stat., Sec. 1674), for an arrest by State officers, "agreeably to the usual mode of process against offenders in such State," ap-

plies only to State procedure for arrest, imprisonment, or bail, and not to procedure in the Federal courts, and the defendant obtains no vested right to a preliminary examination before a commissioner.

Roth vs. U. S., 294 Fed., 475, 478.

A defective seizure cannot be made effective without the repair of the defects. To cure it we must make it sufficient; the remedy must be administered to the seizure itself, so as to make it whole. So long as it remains insufficient, no pleading nor judicial order, nor even admission by the claimant, which do not concede the legality of the seizure, can lead to a lawful condemnation of the thing.

Waples on Seizure, Section 43.

> "Let it never be questioned that proceedings *in rem* are void *ab initio* without seizure sufficient; that there is no reliable authority, and can be none to the effect that insufficient seizure can be cured by anything less than the making of it sufficient."
>
> *Waples on Seizure*, Sec. 43, Note.

The protection (of the Fourth Amendment) against unreasonable searches and seizures does not apply to searches and seizures under statutes providing for the collection of the public revenue, nor does it conflict with the authority of officers or private persons under proper limitations to arrest without a warrant when *authorized by the common law or by a statute.*

Property held contrary to law: It has been held, however, that only such property or articles as are in-

tended to be used in violation of law and can be used for no legitimate purpose can be summarily seized by the police authorities, and that an article which may or may not be used for legal purposes cannot be seized until it has first been properly established in a court of criminal jurisdiction that the article was procured, held, or used for an illegal purpose.

Board of Police Commissioners vs. Wagner, 93 Md., 182; 24 R. C. L., 717.

Point VII.

Adoption.

The appellant has previously cited the law of prize being the only statute using the word "adopt" and intimating that a seizure may be adopted by the Government. We have also quoted that rule of law, which says that in order for there to be an adoption of a seizure there must have been a right of seizure either by common law or statute.

In Rhode Island there was no common-law right of seizure for transportation of intoxicating liquors, and under the Rhode Island statutes there is no authority for a seizure of the vehicle transporting intoxicating liquor.

It naturally follows that there was no authority, either at common law or by the statutes of the State of Rhode Island, authorizing a police officer to seize any vehicle transporting intoxicating liquor. If the seizure can be validated in any sense, it must be on the theory that a police officer is authorized by Section 26 to seize

vehicles transporting intoxicating liquor, and in determining this we should keep in mind the fact that the rules of the police department of the city of Providence do not authorize a police officer to act as a Federal officer nor to hold any office other than that to which he is appointed.

Police of the city of Providence are, therefore, not officers of any law other than the laws of the State of Rhode Island under which they are created.

POINT VIII.

Forfeitures.

The forfeiture of a vehicle used for the unlawful transportation of intoxicating liquor under Section 26, Title II, of the National Prohibition Act *is not absolute*, as was the forfeiture of vehicles used in the removal of liquor on which the revenue tax was not paid, under Rev. Stat., Sec. 3450.

U. S. vs. Sylvestre, 273 Fed., 253.

A statute imposing a forfeiture should be strictly construed and in a manner as favorable to the person whose property is to be seized as is consistent with fair principles of interpretation.

U. S. vs. One Cadillac 8 Automobile, 255 Fed., 173 (D. C.).

Cases decided upon statutes which forfeit vehicles or vessels *ipso facto* adhere to the theory of adoption.

"The Caledonian," 4 Wheat., 99-101.

Taylor vs. U. S., 3 How., 197.

Wood vs. U. S., 16 Peters, 341.

Other cases hold that where a statute takes away a common-law right it is penal in its nature and must be strictly construed. These cases hold that police officers are not authorized to seize under Section 26, Title II, of the National Prohibition Act.

U. S. vs. Loomis, 297 Fed., 359 (C. C. A., 9).
U. S. vs. Thomas, 297 Fed., 362 (C. C. A., 9).
U. S. vs. One Reo, 6 Fed. (2d), 413 (D. C.).
U. S. vs. Hydes, 267 Fed., 470 (D. C.).

The distinction between cases upon which seizure may be adopted and those in which the theory of adoption does not prevail are found in recent decisions.

U. S. vs. One Studebaker, 4 Fed. (2d), 534 (C. C. A., 9).

In the latter case the Circuit Court explains the decision of *U. S. vs. Loomis* and sustains its prior decision.

Point IX.

Miscellaneous.

Articles designed for use in violation of the criminal law and which can be used for no legitimate purpose whatever may be seized by police authorities, providing there is statutory power therefor.

Bd. of Police vs. Wagner, 93 Md., 182.

The seizure in the above case was upheld by the court on the ground that the property seized could be put to no legitimate use under any theory of law.

A seizure is an assertion of title in the Government, and the subsequent proceedings in court are proceedings to try the title so asserted.

The Missouri, Fed. cases 479 and 481.

Pelham vs. Rose, 76 U. S. (9 Wall.), 103, 106.

The appellant desires to call the Court's attention under this point to the fact that at the time the "*Ray of Block Island*" was taken over by the Federal agents there was no liquor on board and there was no transportation of liquor in the sense of the wording of Section 26, Title II, of the National Prohibition Act.

When a forfeiture of property is made absolute by statute the forfeiture must be deemed to attach at the moment the offense is committed.

Traffic Truck Sales Co. vs. Justices Ct., 192 Cal., 377.

This Court has held that searches and seizures in behalf of the United States are always within the jurisdiction of district courts of the United States. If seizure is made by a Federal officer, he may be compelled to either proceed for forfeiture or to abandon the seizure.

Query: Would the court have the same jurisdiction over a police officer in the case of the motor boat "*Ray of Block Island*"?

Slocum vs. Mayberry et al., 2 Wheat., 1.

We are familiar with that section of the case of *Carroll vs. U. S.*, 45 Sup. Ct. Rep., 280, where the court, at page 285 (267 U. S., 132, 152), says:

> "We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon, or automobile for *contraband goods*, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

The court had in mind questions of probable cause on what is deemed an unreasonable search and seizure. In the next paragraph the court says:

> "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor," etc.

and further on:

> "Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in:"

and still further, on the same page, this Court said:

> "Section 26, Title II, of the National Prohibition Act, like the second section of the act of

1789, for the searching of vessels, like the provisions of the act of 1815, and section 3601, Revised Statutes, for searching vehicles for smuggled goods, and like the act of 1822, and that of 1834 and section 2140, R. S., and the act of 1917 for the search of vehicles and automobiles for liquor smuggled into the Indian country, was enacted primarily to accomplish the seizure and destruction of contraband goods; secondly, the automobile was to be forfeited; and thirdly, the driver was to be arrested."

At page 286 in this case, as reported in 45 S. C. R., the court says:

"Section 26 was intended to reach and destroy the forbidden liquor in transportation and the provisions for forfeiture of the vehicle and the arrest of the transporter were incidental. * * * * Under Section 28, Title II of the Prohibition Act, the Commissioner of Internal Revenue, his assistants, agents and inspectors are to have the power and protection in the enforcement of the act conferred by the existing laws relating to the manufacture or sale of intoxicating liquors. Officers who seize under section 26 of the Prohibition Act are therefore protected by Section 970 of the Revised Statutes (Comp. St. Sec. 1611), providing that: 'When, in any prosecution commenced on account of the seizure of any vessel, * * * made by any collector or other officer, under any act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the Court that there was reasonable cause of seizure, the

court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs.' "

These paragraphs were previously quoted by the justice in the District Court for the District of Rhode Island in his opinion (R., 13-14).

The appellant feels constrained to emphasize the words of the district court in the last paragraph on page 14 of the record, which are as follows:

> "While a statute of the United States may provide that action may be taken by state officers in aid of a federal statute, it is doubtful if a federal statute can impose upon a state officer a positive duty of that kind. At least we should be disinclined to construe a statute imposing a duty upon 'any officer of the law' to include other officers than those of the United States. We should at least require unambiguous language to support such a construction."

With these paragraphs in mind, it is well to read the first few lines of section 26 of Title II of the National Prohibition Act, which says:

> "When the commissioner, his assistant, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law intoxicating liquors in any wagon, buggy, automobile, water or air craft or other vehicle, *it shall be his duty* to seize any and all intoxicating liquor found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he *shall take posses-*

force this section, then there is no statutory authority for a seizure by the police of any city or town.

Without such authority, under cases such as "*The Caledonian*" and *Gelston et al. vs. Hoyt*, the theory of adoption collapses. There was no common-law right to seize for illegal transportation, so that the theory of adoption could not be predicated upon such a basis. There is no Rhode Island statute permitting seizure of vehicles for unlawful transportation and adoption by a citizen surely could not follow.

There remains, then, as a basis for a valid seizure section 26 only. If the police are not officers of the law properly authorized to seize under this section, as is set forth in the Loomis case, and the circuit court decision in the case at bar, there remains the discussion of the seizure as a citizen under said section 26. Keeping in mind that it is a penal statute to be strictly construed, there is no authority for a person to make a valid seizure under said section 26, and therefore the theory of adoption must fail.

For the reasons set forth the appellant contends, and especially where the vessel was turned over to the Federal authorities long after the liquor was removed from it, that the decree of the district court was correct, and that the Circuit Court of Appeals for the First Circuit was in error in entering the decree dated March 3, 1926 (R., 26), and the appellant therefore urges upon this Court that said decree of the Circuit Court of Appeals be reversed, and that the case be remanded to the District Court for the District of Rhode Island, with instructions to enter a decree for the de-

livery of said motorboat "*Ray of Block Island*" to the claimants.

Respectfully submitted,

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JOSHUA T. DODGE,
By Their Attorneys DANIEL T. HAGAN,
PETER W. McKIERNAN.

Argued by DANIEL T. HAGAN.